

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

WHEELER PEAK, LLC
an Illinois limited liability company,

Plaintiff,

vs.

No. CIV 07-1117 JB/WDS

L.C.I.2, INC., a New Mexico Corporation,

Defendant.

L.C.I.2, INC., a New Mexico Corporation,

Counterclaimant,

vs.

WHEELER PEAK, LLC,
an Illinois limited liability company,
KMG, INC., an Illinois Corporation, and
KEITH GILES, an individual,

Counter-Defendants.

L.C.I.2, INC., a New Mexico Corporation,

Third-Party Plaintiff,

vs.

DONNER PLUMBING AND HEATING, INC.;
JC CONSTRUCTORS, INC., and DE LA
TORRE ARCHITECTS, P.A., A.I.A., and
Simplex Grinnell, LP, Melissa Deaver-Rivera,
Carl Davis and Lisa Davis, husband and wife,
David Borns, Roy Diklich and Kathy Diklich,
husband and wife, Kent Nix and Angela Nix,
husband and wife, Joseph Forbess and Lisa Forbess,
husband and wife, and Ted Galanthay and Phyllis Galanthay,
husband and wife,

Third-Party Defendants.

DONNER PLUMBING AND HEATING, INC.,

Third-Party Plaintiff,

vs.

PARKER EXCAVATING, INC.,

Third-Party Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendant LCI2, Inc.'s Motion to Dismiss and/or Strike Third-Party Plaintiff Linda Holley's First Amended Complaint for Breach of Contract, Breach of Warranty, Negligence, and Unfair Practices, filed September 14, 2009 (Doc. 362). The Court held a hearing November 23, 2009. The primary issue is whether the Court should dismiss Linda Holley's pro se Amended Complaint which she filed almost two years after the commencement of this lawsuit without first obtaining permission to intervene. The Court will grant LCI2's motion.

Wheeler Peak filed its Complaint for Breach of Contract, Breach of Warranty, Negligence and Unfair Practices on November 6, 2007. See Doc. 1. Holley filed her third-party pro se Complaint for Breach of Contract, Breach of Warranty, Negligence and Unfair Practices on August 12, 2009. See Doc. 307. On August 25, 2009, Holley filed her First Amended Complaint for Breach of Contract, Breach of Warranty, Negligence and Unfair Practices. See Doc. 339.

Defendant LCI2, Inc. filed its Motion to Dismiss and/or Strike Third-Party Plaintiff Linda Holley's First Amended Complaint for Breach of Contract, Breach of Warranty, Negligence, and Unfair Practices on September 14, 2009. See Doc. 362. LCI2 contends that the Court should dismiss Holley's Amended Complaint because she filed it, almost two years after the

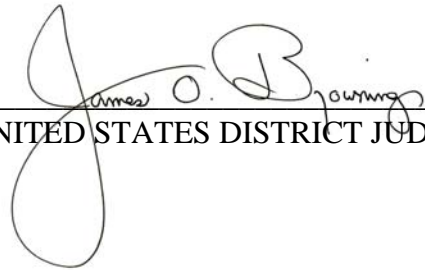
commencement of this case, without first filing a motion to intervene as rule 24 of the Federal Rules of Civil Procedure requires. See Motion at 3-4 (Doc. 362). Holley did not file a response in opposition to LCI2's motion. See D.N.M. LR-Civ. 7.1(b) ("The failure of a party to file and serve a response in opposition to a motion within the time prescribed for doing so constitutes consent to grant the motion."). Holley subsequently filed a motion to intervene. See Motion to Intervene and Assert Claim, filed September 15, 2009 (Doc. 363).

The Court held a hearing on LCI2's motion to dismiss Holley's amended complaint on November 23, 2009. See Clerk's Minutes at 1, filed November 23, 2009 (Doc. 433). At the hearing, the Court noted that Holley did not file a response in opposition to LCI2's motion, asked Holley if she opposed LCI2's motion to dismiss her amended complaint, and asked Holley if she had any problem with the Court granting LCI2's motion and moving on to Holley's motion to intervene. See Hearing Transcript at 225:18-226:3 (taken November 23, 2009) ("Tr.") (Court).¹ Holley did not oppose the Court granting LCI2's motion, responding: "Certainly, that's fine." Tr. at 226:4 (Holley). The Court stated it would grant LCI2's motion to dismiss Holley's Amended Complaint. See Tr. at 226:5-6 (Court). Shortly thereafter, during the hearing, Holley tendered her Second Amended Complaint to the Court. See Third Party Plaintiff Linda Holley's Second Amended Complaint for Breach of Contract, Negligence, and Unfair Practices, filed November 23, 2009 (Doc. 429).

IT IS ORDERED that Defendant LCI2, Inc.'s Motion to Dismiss and/or Strike Third-Party Plaintiff Linda Holley's First Amended Complaint for Breach of Contract, Breach of Warranty,

¹The Court's citations to the transcript of the November 23, 2009 hearing refer to the court reporter's original, unedited version. Any final transcript may contain slightly different page and/or line numbers.

Negligence, and Unfair Practices is granted.



UNITED STATES DISTRICT JUDGE

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